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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In Re: ARRCOM, INC., DREXLER ENTERPRISES, INC., et al., Respondents.	No. X83-04-01-3008 & X83-04-02-3008 MEMORANDUM IN SUPPORT OF APPEAL

ERRORS ASSIGNED FOR REVIEW ON APPEAL

1. AS TO CRAGLE AND INMAN (OWNER-LESSORS OF THE TACOMA FACILITY), THE PRESIDING OFFICER ("ALJ" HEREIN) ERRED BY RULING THAT THEY WERE NOT, AS OWNERS OF THE RCRA FACILITY, ALSO LIABLE, JOINTLY AND SEVERALLY, FOR CIVIL PENALTIES FOR VIOLATIONS AT OR REGARDING THE TACOMA FACILITY. (Initial Decision pages 8-11, and 25-26.)

2. THE ALJ ERRED BY PURPORTING TO REVISE AND REISSUE AN RA'S IN PERSONAM COMPLIANCE ORDER WHEN (NOTWITHSTANDING 40 CFR PART 22) THE ALJ HAS ONLY THE POWER TO ENTER A DECLARATORY ORDER CONCERNING AN RA'S IN PERSONAM ORDER WHICH THE ALJ HAS ADJUDICATIVELY REVIEWED IN THE RCRA § 3008(b) HEARING. (Initial Decision, pages 28-30, specifically paragraphs 2 and 3 on pages 29 and 30.)

STATEMENT OF THE CASE

While this proceeding is a consolidation of two cases, one involving an Idaho facility and the other involving a Tacoma,

Washington facility, this appeal involves only the Tacoma facility and parties connected with it.

The Complaint as to the Tacoma facility charged the Drexlers and their corporations as operators of the RCRA facility, and charged Cragle and Inman as owners of the RCRA facility, with violating Section 3005(a) of the Resource Conservation and Recovery Act of 1976, as amended (hereinafter "RCRA"), 42 U.S.C. §6925, and 40 CFR Part 265, Subparts A and B, and §270.1, for operating a new hazardous waste facility for the treatment and storage of hazardous wastes without first having obtained a duly issued RCRA permit. The ALJ determined that indeed a new hazardous waste facility was illegally maintained at the Tacoma facility. However, the ALJ determined that respondents Cragle and Inman (the "owners") were not liable for penalties for failing to obtain a RCRA permit nor were they liable to perform appropriate closure activities at the facility. Initial Decision at pp. 8-11, 25-26 and 28-30.

The ALJ here determined that Cragle and Inman owned the land and building where the Drexlers conducted a hazardous waste management operation. He also determined that Cragle and Inman had leased those premises to the Drexlers. There is no error assigned to these determinations. The lease itself was never offered or admitted into evidence nor was secondary evidence admitted as to the lease terms.

But the ALJ also determined that Cragle and Inman had no sufficient "connection" or "affiliation" with Drexlers' operations on the premises to be held vicariously liable on principles of collaboration, aiding, abetting, partnership, agency, or traditional

tort theories of vicarious liability. Even though Region 10 may quarrel with that appraisal of the evidence, still, no error is assigned on this appeal to that largely factual determination of the ALJ. 1/

However, the ALJ went even further and ruled, in effect, that even though EPA's regulations purport to impose liability directly upon owners of RCRA facilities upon the basis alone of their status as owners, such regulations were legally inefficacious to accomplish that result. In terms of result, the ALJ ruled the owners of RCRA facilities could be held liable for violation of RCRA regulations only if it were proven that they incurred vicarious liability for the operator's conduct even in absence of such regulations. Region 10 contends the ALJ erred in making these rulings because (A) he implicitly invalidated RCRA regulations when only the D.C. Court of Appeals had or has jurisdiction to do that under RCRA § 7006(a)(1), and (B) the RCRA statute and its legislative history are absolutely clear in stating that owners are liable under the RCRA regulatory scheme.

Additionally, the ALJ purported to review, revise, and to reissue the RA's previously issued in personam or "compliance order" despite Region 10's contention that the ALJ had power only

1/ It was the Region's position that principles of vicarious liability from whatever source (criminal, civil, or admiralty substantive law) may be applied in Federal civil penalty cases to support the adjudication of liability against a person whenever such an imposition of liability, "vicariously", is not inconsistent with the statute or EPA regulations involved. Here, Region 10 argued below that Cragle and Inman should not have been permitted to "hide", in effect, behind the boiler-plate lessee promises in their lease and engage in affected ignorance as to what activities were actually occuring on their premises. They collaborated with, aided, and abetted the Drexlers and should have been adjudged vicariously liable on those grounds. However, as previously noted the ALJ ruled against Region 10 on this aspect of the case and Region 10 seeks no review of that ruling even if it is erroneous.

to review that order and declare its terms valid or invalid in whole or part, and did not have the power to "reissue" that order in such form and with such decretal terms as the ALJ thought best. 2/ While the actual revisions made by the ALJ may not be prejudicial, the ALJ's appropriation to himself of the power of "revising and reissuing" such an RA's order after adjudicatively reviewing it, is highly prejudicial in that it arrogates Agency power vested in only executive officials, and it exceeds the adjudicative powers delegated to presiding officers by 40 CFR Part 22, or conferred on them by 5 U.S.C. §556. In short, the ALJ exceeded his jurisdiction and by revising and reissuing the RA's order. The ALJ thereby converted the RA's order from an executive command into an adjudicative order for specific relief when EPA has no statutory power or authority to issue such an order in the present circumstances. EPA has the power under the RCRA statute and the APA to issue only money (i.e., penalty) adjudicative orders. EPA is not empowered adjudicatively to order specific relief either for EPA or for a non-government claimant. Such actions by the ALJ are also assigned as errors on this appeal. 3/

ARGUMENT

I. OWNER-LESSOR LIABILITY

By legislative fiat under RCRA §§ 3004 and 3005, "owners" of RCRA facilities are liable (as are "operators" of the same

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2/ Even though the substance of what the ALJ purported to specify by decretal terms in paragraphs 2 and 3 on pages 29 and 30 is not inherently objectionable, nevertheless, the ALJ lacked the lawful power and authority to "issue" such decretal terms as opposed to adjudicatively declaring that such terms were proper for the Region 10 RA to include in the RA's order by appropriate amendment.

3/ See next page

3/ Region 10 does not, by this appeal, propose to curtail at all any of the overall statutory powers EPA has long been regarded as having. The Region seeks only a reasonably definitive determination of the proper adjudicative versus executive nature of EPA's statutory powers involved in this RCRA case, and a reasonably definitive determination of the limits of the respective roles which adjudicative EPA officials and EPA executive officials have regarding the exercise of those powers. As one means of demonstrating the candor of Region 10 and the genuiness of such purposes, Region 10 readily concedes the accuracy of the following propositions which directly or peripherally affect the power of presiding officers conferred by 40 CFR Parts 22 and 114, and 5 U.S.C. §556:

A. Civil penalty proceedings commenced by EPA (both administrative and judicial) are wholly "equitable" proceedings and are not actions at law. They are a specialized form of equitable proceeding established by statute. All equitable maxims and defenses apply in such proceedings unless restricted by the terms of statutes, regulations, and controlling caselaw. There is no right on EPA's or a respondent's part to a jury trial in such proceedings. See U.S. v. Tull, 769 F2d 182 at 186-187 (4th Cir. 1985) and cases therein cited, and U.S. v. Lambert, 13 ELR 20489 (M.D.Fla. 1983).

B. Because any such civil penalty proceedings are equitable only, the Administrator constitutes (when authorized by statute to adjudge such penalties) a specialized equity tribunal, and his adjudicative powers in those specific instances inherently include all the discretion, innovation, and adaptation in Equity which the Federal Courts hold under Article III of the United States Constitution;

(1) EXCEPT as otherwise constrained by the controlling statute, the APA (5 U.S.C. § 551 et seq.), EPA regulations, or controlling administrative or judicial adjudicative decisions; and

(2) EXCEPT contempt powers or similar powers exercisable by affirmative in personam orders as opposed to exercisable by "preclusive rulings" (e.g. the exclusion of evidence, the striking of pleadings, etc.); and

(3) EXCEPT the power to issue (through adjudications) in personam orders of an injunctive character (prohibitory or mandatory) UNLESS expressly empowered by a statute to grant such relief or redress for a pre-existing claim as an adjudicative tribunal; and

(4) EXCEPT the power to "stay" or "enjoin", the legal operation of an RA or AA issued RCRA "compliance" or "in personam" order as opposed to adjudicating by declaratory order the validity and enforceability, vel non, of such an order; and

(5) EXCEPT the power to "revise", "vacate", and/or "reissue" an RA or AA issued RCRA "compliance" or "in personam" order as part of an adjudication to "review" that order; and

facilities) for violations of 40 CFR Parts 260-270 regulations. No additional "participatory nexus" need be proven under the statute or regulations to sustain such owner liability other than legal or equitable "ownership" of the premises.

The ALJ relied on Amoco Oil Co. v. EPA, 543 F2d 270 (D.C. Cir. 1976) which decided that under CAA § 211 [42 U.S.C. § 7545]

3/ (continued)

(6) EXCEPT the power to interfere with or review in any way an RA's or AA's administrative investigative information gathering actions (for example, an RA or AA issued subpoena under 15 U.S.C. § 2610(c), or an order issued under CWA § 308 or CAA § 114 or RCRA § 3013).

C. Pursuant to the Administrator's equitable adjudicative powers, presiding officers in civil penalty cases have the INHERENT authority under 40 CFR Parts 22 and 114, and 5 U.S.C. § 556;

(1) to rule that respondents are jointly and severally liable (a) upon any Federally recognized ground for vicarious liability, and (b) when concurrent duties are imposed on two or more respondents; and

(2) with respect to each proven violation, (a) to adjudge civil penalties as a single lump sum for which all designated respondents are jointly and severally liable; and/or (b) to adjudge and allocate civil penalties severally only among the designated respondents with a several amount adjudged for each; and

(3) to suspend, defer the payment of, and remit, contemporaneously adjudged penalties, with or without coercive conditions being imposed in the adjudicative order.

D. At the appellate level of administrative adjudicative proceedings, the Administrator personally holds executive as well as adjudicative powers to exercise in resolution of a matter which otherwise is wholly adjudicative [See, for example, In re BKK 1 RCRA (3008) 84-5 dated 23 Oct 85] but this phenomenon exists only as to the Administrator personally absent his contrary delegation of his powers.

statutory language, EPA did not have the power to promulgate unleaded fuels regulations which (according to the AMOCO court) imposed vicarious liability on gas station owner-refiners/lessors for the conduct of gas station operators/lessees.

The ALJ in this case did not fully explicate what he was, in effect, doing, but there can be no dispute about the fact that the ALJ did decline to apply RCRA § 3005 and 40 CFR Part 265 Subparts A and B and Part 270 to Cragle and Inman as "owners" of the Tacoma RCRA facility despite Region 10's urgings, and the regulatory language, to the contrary.

It is respectfully submitted that the ALJ erred in those respects because (A) he lacked jurisdiction perforce of RCRA 7006(a)(1), 42 U.S.C. § 6976(a)(1), to even entertain the issue of validity or invalidity of all or a part of 40 CFR Parts 260 - 270, and (B) the regulations violated regarding the Tacoma facility are clearly lawful because they are based on RCRA § 3004 and its command to promulgate regulations which obligate "owners" as well as "operators" (which differentiates this case completely from the facts in the AMOCO case where CAA § 211 statutory language said absolutely nothing about "refiners" who owned gas stations).

In RCRA §§ 3004(a) and 3005(a) EPA is commanded by Congress to promulgate regulations providing duties for both owners and operators of hazardous waste facilities. Indeed, the conference report accompanying RCRA enactment in 1976 stated clearly as follows:

> It is the intent of the Committee that responsibility for complying with the regulations pertaining to hazardous waste facilities rest equally with owners and operators of...[such sites and facilities]...where the owner is not the operator. (Emphasis added.) 1976 USCAN at 6266 H.R.Report NO. 94-1491 dated Sep. 9, 1976, 94th Cong. Second Session.

This unusual statutory requirement was obviously done to ensure "cradle-to-grave" control of dangerous hazardous wastes in the face of unsuccessful attempts to address the problem in other ways.

Based on RCRA §§ 3004 and 3005, EPA promulgated such regulations. The provisions of 40 CFR §§ 265.1, 265.10, 267.2, 271.2, and 270.2 clearly state or indicate that the provisions of Parts 265, as well as Parts 264, 267, 270, and 271 apply to "...owners and to operators...." (Emphasis added.) Unless otherwise specifically provided therein, the regulations obligate the owners of RCRA facilities as well as the operators of those facilities to do or refrain from certain matters.

The basic duty imposed by the regulations at issue here, as stated in 40 CFR § 270.1(c), is that "...owners and operators of hazardous waste units must have permits during the active life (including the closure period) of the units." (Emphasis added.)

It is important to note in this case that the statute and regulations at issue do not actually impose "vicarious liability". Instead, they simply impose "duties" directly on owners and directly on operators. The statute imposes "liability" for breach of any such duties. It may be that if an operator fulfills a regulatory duty (e.g., obtaining a RCRA permit), then that single result or

event may at one and the same time obviate or satisfy a comparable duty on the part of the owner. However, that phenomenon of "joint" or "concurrent" duties dischargeable by a single performance does not convert the RCRA regulations into "vicarious liability" regulations.

In the AMOCO case, the court seems to have reasoned that because non-participatory refiner-owners of gas stations were not specified (contrary to the case at bar) among the entities specifically mentioned by the CAA § 211 language as those for whom EPA was authorized to make regulations, then the challenged regulations there could be upheld only in the event that promulgating a "vicarious liability" regulation was a legitimate exercise of rulemaking power to implement CAA § 211. There, the D.C. Court of Appeals ruled that, under the circumstances of the oil refining industry, "vicarious liability" regulations were not a legitimate means of implementing CAA § 211. In the instant case, because §§ 3004 and 3005 explicitly identify "owners" as well as "operators" of RCRA facilities, the AMOCO decision is inapposite. Here, the liability "owners" incur is their own. It is not liability incurred "vicariously".

In passing, it is worthy to note that the AMOCO decision has questionable precedential value (wholly apart from the fact that it actually ruled only that the CAA statutory language did not, contrary to the case at bar, confer on EPA power to impose liability on non-participatory refiner-owners of gas stations) because it assumed (rather than decided) that "fault" is a necessary element of liability for regulation violation when the trend of pollution law is clearly in favor of strict liability, and because it assumed

(again without deciding) that traditional concepts of "tort" vicarious liability (rather than the statutory language) from nameless and unspecified jurisdictions somehow operated inherently under Federal law to limit the power of an agency to promulgate regulations which impose various duties. That is submitted to be an erroneous conclusion predicated largely upon dicta in a single Supreme Court case cited by the AMOCO court. If what the AMOCO court really meant is only that regulations can impose duties only to the extent authorized by the empowering statute, then the conclusion is unobjectionable.

It is for the D.C. Court of Appeals only to say whether the "rational nexus" between authorized RCRA regulatory goals and any duty imposed upon facility owners as a means of implementing RCRA is too tenuous to be sustained under relevant rulemaking criteria. An ALJ cannot, as to RCRA, properly rule that "owners" are not liable when the RCRA regulations clearly and plainly impose duties on them, and the statute clearly and plainly imposes liability on them for breach of those duties.

The Court of Appeals for the D.C. Circuit is the sole tribunal which has (or had) exclusive jurisdiction to rule EPA's regulations in point to be "invalid". The ALJ lacked in this case lacked such jurisdiction, and the initial decision should be modified accordingly to add Cragle and Inman to those ruled jointly and severally liable in the penultimate paragraph on page 26 for $3,000 civil penalties regarding the Tacoma facility.

Even assuming, arguendo, that the RCRA regulations in this case did create and impose "vicarious" liability, the same bar exists against the ALJ doing anything other than applying the regulations as

RCRA § 3008(a), but it is inherently virtually the same type of in personam command or "order" which the Administrator is empowered to under several other statutory sections or subsections. The other such orders are those provided for in the following statutes and sections: CWA §§ 308(a), 309(a), and 504(a); CAA §§ 113(a)(1), 114 (a)(1), and 303(a); NCA § 10(d); SDWA § 1431(a); FIFRA § 13(a); CERCLA § 106(a); and RCRA §§ 3008(h) and 7003(a). Accordingly, the problem is far more broad and fundamental to the whole operation of EPA than footnote 3 of the initial decision suggests.

What the ALJ actually did in the initial decision in this case at paragraphs 2 and 3 on pages 29 and 30, was to revise and reissue an RA previously issued in personam or "compliance" order. Part 22 of 40 CFR does not authorize such action. Part 22, at best, currently empowers ALJs only to enter declaratory orders regarding such RA issued RCRA orders, and to declare thereby which, if any, provisions or omissions in such orders are invalid and unenforceable, and to declare what, if any, alternate or additional language may be inserted therein by an RA's amending order to cure any invalidated provision or omission. An ALJ admittedly has power in adjudging penalties to attenuate the amount of the penalties proposed by an RA against non-participatory "owners" whom the ALJ believes were "unfairly snared" by EPA's regulations. But the ALJ can only declare the decretal portions of an RA's order valid or invalid. An ALJ cannot "revise and reissue" for the RA the in personam order.

Admittedly, Part 22 delegates to ALJs all the adjudicative

they are written. Accordingly, even if such regulations are thought to be "clear departures" from "traditional" "tort concepts" of vicarious liability, the ALJ was nevertheless obligated to rule that Cragle and Inman are liable on the basis alone of their ownership of the Tacoma facility simply "because the regulations say so". Only the Court of Appeals may adjudicate the validity or invalidity of any such RCRA regulations even if they did impose only "vicarious" liability.

II. ADJUDICATIVE REVIEW OF RA ISSUED IN PERSONAM ORDERS.

The remaining cluster of issues for which Region 10 seeks review on this appeal is more broad and far-reaching. While these issues directly involve only a RCRA § 3008(a) order, the principles urged here (and to be decided here) necessarily affect each and every EPA statutory administrative order commanding a respondent personally to do something or to refrain from doing something, regardless of the statute or section which empowers the Administrator to issue such an order. Accordingly, the matter is far more weighty than the footnote 3 discussion by the ALJ otherwise indicates, albeit the issue can presently arise (because of differing statutes) before an ALJ only as to RCRA orders issued by EPA Regional Administrators (RAs).

This assignment of error submits for decision (and delineation) the respective roles and functions of ALJs vis-a-vis RAs regarding the issuance of what are colloquially called "compliance orders", i.e., in personam orders which specifically and personally command a respondent to act this way or that, and/or to refrain from acting in particular circumstances. The order here was issued pursuant to

powers the Administrator personally holds, including the adjudicative powers conferred by 5 U.S.C. § 554(e) to enter declaratory orders. However, Part 22 does not delegate any of the Administrator's executive powers. Only the EPA Delegations Manual section 8-9A dated March 20, 1985, delegates the Administrator's powers to issue in personam compliance orders pursuant to RCRA § 3008(a), and that delegation is to EPA executives. That delegation purports to be (and correctly so) a delegation of executive powers. Accordingly, when an ALJ purports to "modify" and "reissue" (after a RCRA § 3008(b) hearing) a previously RA issued compliance order, the ALJ thereby infringes upon and arrogates to himself/herself the power to issue such executive orders. The ALJ thereby inherently prevents the issuing RA from later amending or modifying the ALJ formulated and reissued compliance order, even though RAs traditionally exercise the power routinely to amend, modify, or vacate compliance orders previously issued by them.

Another invidious consequence which ALJ "modification and reissuance" causes is the putative conversion of what is originally an "executive" command or order (which does not of itself collaterally estop or operate as res judicata, etc.) into an adjudicative "remedy" for some antecedent unliquidated claim, which adjudicative order is equivalent to equitable injunctive relief granted by the courts! If such orders are "adjudicative specific relief", then they can hardly operate upon RA-issuance to "...[require]...compliance immediately..." as authorized by RCRA § 3008(a), when the RA holds no hearing and does not even engage in adjudicative acts in the process of formulating and issuing the order. Many respondents overlook that point.

The statutes providing for all such orders implicitly authorize them only as executive commands and do not authorize them as "redress", "remedies", or even as "sanctions". Admittedly, they resemble in form injunctions or "specific relief" orders issued by courts, and that may well be the source of the mis-identification and mis-characterization of such orders which results in the type of error which the ALJ made here.

The EPA issued administrative orders, such as the one at issue here under RCRA § 3008(a), more often than not merely reinforce pre-existing legal duties originally imposed by a statute, regulation, or permit. Such orders are not provided as part of an arsenal of "remedies" which EPA as an adjudicative tribunal is authorized to grant to some complaining party. They are only regulatory "sticks" given to EPA executives to compel compliance by respondents with their pre-existing legal duties.

The proper function of an ALJ with regard to such RA issued orders is to afford to respondents a pre-enforcement adjudicative review (which is what RCRA § 3008(b) inevitably, and perhaps inadvertently, prescribes) which ordinarily is not available to such respondents in the courts. The price exacted in exchange by § 3008 (b) is that no judicial review will be obtainable by a respondent unless he has exhausted his administrative remedies and has first sought an ALJ's adjudicative review of the RCRA order.

Using the "arbitrary/capricious/abuse of discretion/not in accordance with law" criteria, the ALJ should review the RA's in personam order as Agency non-adjudicative action examinable in the

manner specified in the Supreme Court decision in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). The resulting adjudicative declaratory order of the ALJ, then, only declares what, if anything, is invalid about the RA's order, and declares what language, if any, is unenforceable therein. The ALJ may also declare what language may be added by an RA issued amendment which will cure any invalidated omissions or affirmative provisions in the reviewed RA's order.

While the Agency is bound by the adjudication, an RA is left free to choose (A) to leave the order in its present form [with parts invalidated if that is what the ALJ decided], or (B) to amend the order at issue to conform with the ALJ's declaratory order [in which case no further hearing is required by RCRA § 3008(b) because the respondent has already had one on the very issue before the ALJ and is bound by the ALJ's decision], or (C) to vacate the order litigated and issue a wholly new order [as to which the respondent will have a new opportunity for hearing under § 3008(b)]. Just as the Federal courts do not purport to "edit" or purport to "revise and reissue" EPA administrative orders which they review judicially, (but rather merely uphold and enforce, or declare invalid and unenforceable, the decretal terms of such orders) so too should ALJs remain within the ken of their adjudicatory powers and refrain from purporting to "revise and reissue" RAs' orders, thereby constraining the proper exercise of RAs' executive prerogatives.

To adopt the rationale of the ALJ here (or to adopt any rationale of the process of ALJs reviewing RA issued in personam orders other than the rationale here urged) inevitably leads to the erroneous conclusion that such in personam orders constitute

"adjudicative relief" granted to EPA and as such they can "merge" by mere issuance some pre-existing claim held by EPA against a miscreant. This latter proposition has been implicitly if not explicitly repudiated as to CWA § 309 orders in U.S. v. Detrex Chemical Industries, 393 F.Supp. 735 (N.D.Ill. 1975); U.S. v. Cutter Laboratories, 413 F.Supp. 1295 (E.D.Tenn. 1976); U.S. v. Frezzo Bros. Inc., 602 F.2d 1123 (3rd Cir. 1979); U.S. v. Ft. Pierre, 580 F.Supp. 1036 (D.S.D. 1983).

Those decisions demonstrate that EPA's in personam regulatory (or community protection) orders are truly "executive commands" only and are not "adjudicative remedies" and do not constitute adjudicative "redress". Such orders do not collaterally estop a respondent although they may contain many and detailed "findings" by the issuing RA. They are not res judicata. If such orders are expressly consented to by a respondent, that respondent is probably estopped from thereafter disputing the order's terms and from contending it is not valid, and such respondent cannot claim he is "wronged" by the order's decretal terms because he has consented to them [volenti non fit injuria]. If a respondent fails to request (after due notice) a § 3008(b) hearing, the RA's order is no longer subject to adjudicative review (either by an ALJ or a court) because (A) that respondent did not exhaust his administrative remedies, and (B) the provisions of 5 U.S.C. § 701(a)(1) apply. Such RA issued orders do not merge EPA claims. Despite any such order (even an order issued on consent) EPA may still go to court and seek injunctive relief as well as penalties for the pre-order violations which may have

occasioned the order. Such orders do not diminish, alter, or modify any pre-existing legal duties of a respondent which were imposed antecedently by statute, regulation, or a permit, simply because they are executive commands only (analogous to the commands which a military or naval superior issues to those subject to his/her lawful orders under 10 U.S.C. § 892) which inherently cannot vary prior judicial or legislative acts of government.

The entry of a declaratory order on review of an RA issued compliance order is, admittedly, an adjudicative function properly performed by ALJs. But the "issuance", "revision", "modification", "vacation", or "reissuance" of such an RA issued order is a non-adjudicative or executive function (A) delegated by the Administrator only to those officials specified in EPA's delegations manual (which officials do not include ALJs or other presiding officers), and (B) held by the Administrator personally (e.g., even in combination with his adjudicative functions on this appeal).

The appropriate resolution of the foregoing matters is to find that Part 22 (in light of its 1978 promulgation which cannot take into account either the 1980 or 1984 amendments to RCRA § 3008, and in light of the maxim "Rationes leges cessante, lex cessat. [When the reason for the rule fails, the rule itself also fails.]") does not explicitly control all procedures for the in personam or decretal provisions of RA issued RCRA orders; hence, caselaw decisions by the Administrator and his ALJ delegates may (with due deference to the Overton Park decision) develop any rules necessary pending a revision to or repromulgation of Part 22.

Accordingly, the cited paragraphs 2 and 3 in the initial decision should be modified on this appeal to be prefaced with the phrase being inserted before those paragraphs on pages 29 and 30:

> The following provisions of Compliance Order No. X83-04-01-3008 are hereby declared valid and lawful, as to all respondents named therein including Richard Cragle and Ronald Inman:

CONCLUSION

If the errors assigned on this appeal are resolved in the manner urged in this brief, the initial decision can simply be modified and then affirmed as so modified without the necessity for any remand to the ALJ.

DATED: November 21, 1985

Respectfully submitted,

JAMES R. MOORE
REGIONAL COUNSEL, EPA 10

By: John A. Hamill for
D. Henry Elsen
Assistant Regional Counsel

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In Re:	)	
	)	No. X83-04-01-3008 & X83-04-02-3008
ARRCOM, INC., DREXLER ENTERPRISES, INC., et al.,	)	APPEAL, ALTERNATIVE CONCLUSION OF LAW AND PROPOSED ORDER
Respondents.	)	

An initial decision was issued in this action on October 21, 1985. The decision was served on all parties on October 26, 1985. A Notice of Appeal was filed by Complainant Environmental Protection Agency ("EPA") Region 10 on November 7, 1985, pursuant to 40 CFR §22.30 (1985).

Further pursuant to 40 CFR §22.30, the following Alternative Conclusion of Law and Proposed Order is submitted to the Administrator and his Judicial Officer. A Memorandum in Support of Appeal accompanies the proposed Alternative Conclusion and Order and sets forth EPA Region 10's basis for the Conclusion and Order, and is incorporated herein by reference.

ALTERNATIVE CONCLUSION OF LAW

Respondents Richard Cragle and Ronald Inman, as owner/lessors of an unlicensed hazardous waste storage and treatment facility, are jointly and severally liable for civil penalties and compliance orders, for violation of Section 3005 of the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. §6925 and accompanying regulations.

PROPOSED FINAL ORDER FOR X84-04-01-3008

Pursuant to Section 3008 of the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. §6928, the following is ORDERED:

1. Respondents Arrcom, Inc., Drexler Enterprises, Inc., George Drexler, Terry Drexler, Inc. (d/b/a Pacific Vacuum Service and Golden Penn Enterprises), Terry Drexler, Ronald Cragle, and Richard Inman are individually, jointly, and severally liable for a civil penalty of $3,000.00 for violations as alleged in RCRA Docket No. X83-04-01-3008.

2. Payment of the penalty assessed herein shall be made by forwarding a cashier's check or certified check payable to the Treasurer, United States of America, and mailed to:

Environmental Protection Agency
Region 10
(Regional Hearing Clerk)
P.O. Box 360903M
Pittsburgh, PA 15251

in the full amount within sixty (60) days after service of the Final Order upon respondents. A copy shall be mailed to:

Environmental Protection Agency
Region 10 Hearing Clerk, M/S 613
1200 Sixth Avenue
Seattle, Washington 98101.

3. The following provisions of Compliance Order No. X83-04-01-3008 are hereby declared valid and lawful, as to all named Respondents (including Richard Cragle and Ronald Inman): Respondents or companies owned and/or operated by the Respondents shall not accept at this facility any hazardous waste for disposal. Furthermore, Respondents and/or said companies shall not accept at this facility any hazardous waste for storage or treatment unless said storage or treatment preceeds the use, reuse, recycling or reclamation of the hazardous waste and such hazardous waste is neither a sludge nor hazardous waste listed in Subpart D of 40 CFR 261 until such time as a permit is issued by EPA pursuant to 40 CFR 122 (recodified on April 1, 1983 as 40 CFR 270) and 124 for this facility.

4. Respondents shall submit an approvable closure plan for this facility in accordance with 40 CFR 265, Subpart G within thirty (30) days of receipt of this Order. Closure shall commence upon EPA approval of the plan and shall be accomplished in accordance with 40 CFR 265, Subparts G and J

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and expeditiously as possible but in no event later than one hundred and eighty (180) days from EPA's approval.

Respectfully submitted this 21st day of November, 1985.

JAMES R. MOORE
Regional Counsel
EPA Region 10

By: John A. Hamill
for D. HENRY ELSEN
Assistant Regional Counsel

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In Re: ARRCOM, INC., DREXLER ENTERPRISES, INC., et al., Respondents.	No. X83-04-01-3008 & X83-04-02-3008 REQUEST FOR ORAL ARGUMENT

The matters raised by this appeal are basic and fundamental to the administration of the RCRA regulatory scheme. No previous decisions by ALJs or the Administrator adequately or even squarely address these basic issues. No clear precedent exists which addresses these issues in the context of the RCRA statute.

Therefore, pursuant to 40 CFR §22.30(d), appellant EPA Region 10 hereby requests that oral argument be held before the Administrator or his designate, if the Judicial Officer is inclined to rule adversely to Region 10 on this appeal or if he determines that additional articulation of Region 10's reasoning is useful or is needed. It is suggested that oral argument be scheduled in Seattle, Washington, where most parties to the proceeding reside (Respondents/appellees Cragle and Inman reside in Tacoma, Washington).

Respectfully submitted this 21st day of November, 1985.

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REGIONAL COUNSEL

By: John A. Hamill for
D. HENRY ELSEN
Assistant Regional Counsel

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REPLY TO
ATTN OF: M/S 613

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee of the U.S. Environmental Protection Agency Region 10, and that on the date shown below the originals of the ~~foregoing~~ ATTACHED 3 DOCUMENTS were mailed by first-class mail, postage prepaid to the EPA Hearing Clerk in Washington, D.C. (A-110), and copies were mailed by first-class mail, postage prepaid, to the individuals on the attached Service List.

Dated: NOV 21, 1985

PATRICIA M. SUGIURA
Secretary

SERVICE LIST

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Environmental Protection Agency
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Hearing Clerk, A-110
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401 M Street S.W.
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11-20-85

10/21/85

Re: Arrcom, Rathdrum

Henry Elsen / Bill Chamberlain / Ken Feigner

I talked w Navaretta today who advised

1. Sale is still being attempted
   a. giving property away
   b. takes time to negotiate

2. Taxes due - must be paid by ≅ 1/86
   a. $930.00
   b. if not paid - state takes title

3. Closure Plan development
   a. 2 months slop in F.A.O. - wants this additional time
   b. has talked to contractors & prospective purchasers re: development of CP
   c. Price is considerably more than penalty (50 - 60k)
   d. GWM is the expensive item

I gave him no feedback except that we wanted more info as backgd to his letter in order to make decisions.

Let's discuss.